

BOARD OF ALIEN LABOR CERTIFICATION APPEALS
800 K St., N.W.
WASHINGTON, D.C. 20001-8002

Date: December 22, 1998
Case No: 98-INA-159

In the Matter of:

SANTOS HEALTH CARE CORP.
Employer

On Behalf of:

JOCELYN FERNANDEZ
Alien

Certifying Officer: Rebecca Marsh Day
San Francisco, California

Appearance: Richard I. Kinjo
Los Angeles, California
For the Employer and Alien

Before: Holmes, Vittone and Wood
Administrative Law Judges

John C. Holmes
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the employer's request for review pursuant to 20 C.F.R. § 656.26 (1995) of the denial by the United States Department of Labor Certifying Officer ("CO") of alien labor certification. This application was submitted by employer on behalf of the above-named alien pursuant to the Immigration and Nationality Act of 1990 ("Act"). 8 U.S.C. § 1182(a)(5) (1990). The certification of aliens for permanent employment is governed by § 212(a)(5)(A) of the act, 8 U.S.C. § 1182(a)(5) (1990), and Title 20, Part 656 of the Code of Federal Regulations ("Regulations"). Unless otherwise noted, all the regulations cited in this decision refer to Title 20.

Under the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of the application for a visa and admission into the United States and at the place where the alien is

to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified and available; (2) the employment of the alien will not adversely affect the wages and working conditions of the United States workers similarly employed.

We base our decision on the record upon which the CO denied certification and the employer's request for review, as contained in the Appeal File¹ and any written argument of the parties. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On May 2, 1994, Santos Health Care Corporation ("Employer") made an application for alien labor certification for Jocelyn Fernandez ("Fernandez"). (AF 93). Employer was seeking to place Fernandez in the position of Practical Nurse live-in. The duties of the position as described on the ETA-750, were as follows:

To directly oversee a board and care for developmentally disabled. Assists in bathing, grooming, feeding and personal hygiene. Plan and prepare meals. Monitor medications. Accompany residents to and from school, doctors appointment and church services. Due to mental retardation and emotional problems of the residents, we require the person to live in for complete responsibility and supervision of their daily activities, conditions and needs.

(AF 93). The minimum educational requirement for the job was a high school diploma, and the minimum experience requirement for the job was two years.

The CO issued a Notice of Finding ("NOF"), dated January 14, 1997, which proposed to deny certification. (AF 87-91). First the CO found that the employer, who claimed to be a specialized board and care facility, did not present its license to that effect. (AF 88). Secondly, the CO found that the employer's two year experience requirement for the position was restrictive, since it surpassed the experience requirement for Practical Nurse as listed by the Dictionary of Occupational Titles ("DOT"), which is three months to six months. The CO gave the employer the option of withdrawing the two-year requirement or demonstrating the business necessity for the requirement. Next, the CO found that Fernandez did not have two years experience with the developmentally disabled and was not qualified for the position. The CO stated that the Employer could correct this by submitting an amendment to the ETA 750 B that accurately reflects Fernandez's qualifications, if in fact she is qualified as represented on the ETA 750 A. In the alternative the CO stated that if Fernandez does not have the requisite experience as described on the ETA 750 A, the Employer would be permitted to amend the requirements of the ETA 750 A. Lastly, the CO found that one U.S. applicant, Newton, had the combination of education and training or experience to perform the usual requirements of the occupation.

¹ All further references to documents contained in the Appeal File will be noted as "AF."

Likewise the CO provided that the Employer could rebut this finding by demonstrating why the U.S. worker was not qualified for the position based on lawful job related reasons.

In the Rebuttal, dated February 17, 1997, the Employer addressed all of the specific findings of the CO. With respect to the license, the Employer alleged that it has been licensed as a board and care facility for developmentally disabled and enclosed copies of documents that Employer alleged would prove its point. Concerning the restrictive requirement, Employer opted to demonstrate its business necessity for its two-year requirement. Employer argued that:

This requirement is not for our convenience nor personal preference. It would be more convenient and cost effective in fact to require less experience in order to pay the minimum wage. However, in the long run, it would be disruptive to the patient care. We would require someone to provide further training and to constantly supervise those in fact with the very charge of providing the care to the residents. Notwithstanding[,] our business is licensed in the State of California, County of Los Angeles and almost the land of lawsuits. We could not in this place, in this day and age expose ourselves to such possibilities.

(AF 16).

Regarding the finding that Fernandez was not qualified for the position, the Employer submitted an amendment to the ETA 750, Part B, item 14. The amendment alleged that Fernandez was a Home Care Attendant for three years and had the following duties:

Job Duties: Took care of an elderly lady. Planned and prepared her meals. Assisted in changing her clothes, bathing, and feeding. Assisted in taking her medications. Took care of her laundry and cleaning her house.

(AF 14). Employer concluded that Fernandez met the qualifications for the position since she had the job for at least two years as a Home Care Attendant, the related occupation under ETA 750 A, item 14.

In reference to the finding that the Employer had improperly turned down Newton, the U.S. applicant, Employer responded by providing its analysis of Newton's resume.

1. A combination of job duties as maid/desk clerk at the Broadway Motel from 6/81 to 7/85, a period of five years.
2. A combination of job duties as a Nurse-aid/housekeeper from 7/85 to 9/85, a maximum period seemingly of 3 months if . . . on an assumption employment commenced

July 1, 1985 through September 30, 1985, since it was not specified in the resume.

3. Salesclerk job duty with the Salvation Army from 9/88 to 10/89, a period a little in excess of 1 year.

(AF 18). Employer alleged that none of the positions satisfied the job requirements listed for the position and therefore Newton was not qualified.

The CO denied certification in the Final Determination on March 14, 1997. The reasons for the denial had four bases. (1) There was no license submitted which demonstrated that the Corinth Avenue location was “a board and care [facility] for developmentally disabled . . . mental retardation and emotional problems . . .”; (2) Employer submitted regulations for the purpose of demonstrating business necessity for the two-year experience requirement, but never indicated what portion of the regulation required two years of experience; (3) Fernandez was unqualified for the position since she was employed as a home attendant and “[b]ox 14 says nothing about home care attendants.” Also, Fernandez had no experience working with the developmentally disabled. (4) Newton was an unlawfully rejected U.S. applicant since the specific vocational preparation time in the occupation of Nurse Assistant is three to six months, and therefore “. . . she is basically qualified.” (AF 12).

DISCUSSION

We find that the Employer has not demonstrated its business necessity for a two-year experience requirement. As such, we do not reach the other issues in the Final Determination.

Where an Employer requires a higher experience requirement than that listed in the DOT, the Employer must demonstrate the business necessity for the higher requirement. 20 C.F.R. 656.21(b)(2). An employer may show business necessity where (1) the requirement bears a reasonable relationship to the occupation in the context of the employer’s business and (2) the requirement is essential to performing, in a reasonable manner, the job duties as described by the employer. Information, Industries, Inc., 88-INA-82 (Feb. 9, 1989) (en banc).

In Information Industries, the Board established the above test in an attempt to reconcile the congressional purpose behind the act and the actual administration of the labor certification process. There it was determined that while the legislation was designed to protect U.S. workers, the benefit conveyed to business as a result of utilizing qualified employees, cannot be overlooked. However, certification will not issue where an employer only established that “. . . the job requirements merely ‘tend to contribute to or enhance the efficiency and quality of the business.’” Id.

In the instant matter, Employer has asserted that a two-year experience requirement will increase the efficiency and/or quality of its services. Employer stated in its request for review that the two-year experience requirement is to assure, that in the event of an emergency, “. . . someone

with more intelligence, responsibility and experience can respond.” (AF 04). It is difficult to see how Employer’s heightened experience requirement will ensure that people with more “. . . intelligence [and] responsibility . . .” are hired. Why does a person need two years of experience to be intelligent and responsible enough to handle emergencies on the premises? It is not necessarily our position that a person with less experience could handle this job. Employer, however, bears the burden of proving otherwise and has not sufficiently demonstrated a business necessity for the two-year requirement that would overcome the presumption created by the DOT, that three months of experience is sufficient. What Employer has raised is a question of quality of service and this showing is not sufficient to support a grant of certification.

Employer also raises the argument that state regulations warrant the two-year experience requirement. The regulations sent with Employer’s application do not show this requirement. Employer even acknowledges that its submission of the regulations was to enlighten and educate the CO to the gravity of its responsibility and not to establish a two-year experience requirement. (AF 05).

Given these things we find that the Employer has failed to demonstrate the business necessity for its two year experience requirement and support the CO denial of certification.

ORDER

The Final Determination of the Certifying Officer denying labor certification is hereby **AFFIRMED.**

For the panel:

John C. Holmes
Administrative Law Judge